84-6873

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

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ROBERT PATTEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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* PETER M. SIEGEL, Esq.

RANDALL C. BERG, Jr., Esq.

FLORIDA JUSTICE INSTITUTE, INC.
1400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-2081

Counsel for Petitioner

* Counsel to be served,
Member of the Bar of the Court.

Supreme Court, U.S.
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QUESTIONS PRESENTED

I. WHETHER THE FLORIDA SUPREME COURT'S RETROACTIVE REVERSAL OF ITS LONG ESTABLISHED RULE THAT THE STATE BEARS THE BURDEN OF ESTABLISHING THE COMPETENCY OF A PERSON PREVIOUSLY ADJUDICATED INCOMPETENT, AND WHOSE COMPETENCY HAS NEVER BEEN RESTORED, SO DISADVANTAGES A DEFENDANT AS TO VIOLATE THE DUE PROCESS CLAUSE IF HIS CONVICTION IS UPHELD ABSENT ANY PROOF BY THE STATE OF COMPETENCY?

II. WHETHER THE DOUBLE JEOPARDY CLAUSE IS VIOLATED WHEN THE FLORIDA SUPREME COURT ORDERS A DEFENDANT TO UNDERGO A SECOND CAPITAL SENTENCING PROCEEDING AFTER DETERMINING THAT THE TRIAL COURT ERRONEOUSLY REFUSED TO ACCEPT A JURY LIFE RECOMMENDATION?

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Petitioner seeks a writ of certiorari to review a judgment of the Supreme Court of Florida entered in this case on April 18, 1985.

CITATIONS TO OPINION BELOW

The opinion of the Florida Supreme Court, Case No. 61,945, has not yet been officially reported. It is set out as Exhibit A of the Appendix.

JURISDICTION

The original opinion of the Florida Supreme Court was entered on January 10, 1985, and is set out as Exhibit B of the Appendix. A timely Motion for Rehearing, set out as Exhibit C of the Appendix, was denied by an Order of the Supreme Court of Florida dated April 18, 1985, set out as Exhibit D of the Appendix. A revised opinion issued that date because

petitioner's Motion to Supplement the Record, which was joined with the Motion for Rehearing, was granted.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. The Florida Supreme Court's rejection of petitioner's double jeopardy claim is final for purposes of appeal. Bullington v. Missouri, 451 U.S. 430, 437 n. 8 (1981).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case invloves the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF FACTS

Robert Patten was convicted of murder, armed robbery, grand theft, and a probation violation. The trial court sentenced him to death on the murder charge. He was sentenced to 110 years for the robbery, five years for the grand theft and five years for the probation violation, all sentences to run consecutively. On appeal, the Florida Supreme Court affirmed the convictions. It vacated the death sentence and remanded the case to the trial court for a second sentencing proceeding before a second jury.

A. The Continuing Presumption of Insanity.

Several years prior to commission of the offenses here at issue, Robert Patten had been acquitted of other criminal charges on the grounds of insanity. His competency has never been judicially restored. Both the State and the trial court were aware of the prior insanity acquittal. Florida case law, since at least 1892, holds that a previous insanity acquital, without judicial restoration of competency, results in a presumption of continuing insanity.[1] As a result, Florida case law, at the time

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1. The status of Florida law is discussed infra, beginning at page 5.

of Robert Patten's trial and prior to the Florida Supreme Court's decision on his appeal, held that the burden of proof as to the competency of the defendant at the time of subsequent offenses rested on the State. Nevertheless, at trial, neither the State nor the defense produced any evidence relating to Robert Patten's competency at the time he committed the murder and other crimes for which he stands convicted.

Petitioner first raised the issue of the State's failure to establish his competency by way of a timely motion for a new trial (R-535)[2] and then on direct appeal to the Florida Supreme Court. The Florida Supreme Court, holding that insanity is always an affirmative defense, rejected petitioner's argument that the State bore the burden of proving his competency as an essential element of its case.

On timely Motion for Rehearing, petitioner argued that the Court's decison represented a reversal of long established Florida law. He argued that if the change were applied retroactively to his trial, thereby permitting the State to obtain a conviction without proof of competency, it would violate the ex post facto component of the Due Process Clause. The Florida Supreme Court, refusing to even acknowledge that its decision abolished a long-established rule allocating the burden of proof, adhered to its prior opinion without discussion of the issue.

B. The Trial Court's Refusal to Permit the Jury to Return A Life Recommendation.

The Florida capital punishment sentencing scheme calls for the jury to recommend life or death, with the judge making the actual sentencing decision.[3] As interpreted by the Florida Supreme Court, a death recommendation requires a majority vote.

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2. The symbol "R" refers to the separately numbered part of the record on appeal which includes all trial court matters except the transcript (which will be referred to by the symbol "T") and the trial court exhibits.

3. Spaziano v. Florida, 468 U.S. ___ (1984).

A six to six vote is a recommendation for life.[4] At the time of petitioner's trial, the effect of a six to six vote had not been addressed by the Florida Supreme Court. The trial court gave the Florida standard jury instruction with respect to determining the recommended penalty. The instruction is ambiguous. Initially, the instruction states that the jury can recommend life "if by six or more votes" the jurors agree. Subsequently, the instruction asks the jury to report its recommendation "when seven or more are in agreement." The relevant portion of the instruction is contained in Exhibit E of the Appendix.

After deliberating for more than two and one half hours, the jury sent a note to the court stating it had reached a six to six vote and asking: "What now?" (T-1773). Defense counsel argued that a six to six vote was a life recommendation. The State agreed. (T-1774, 1775, 1778). Over defense objection (T-1778), the trial court, on its own motion, proceeded to give its version of a jury deadlock charge (T-1779-80). The Jury Foreman then inquired whether a majority vote was required for a life recommendation (T-1780). The trial court responded that it did not know, that the jury should continue deliberating, and that if a majority could not be reached the court would accept the tie vote as a life recommendation (T-1781-82). Thirty minutes later (T-1783), the jury returned with a seven to five death recommendation (T-1785). The relevant portions of the transcript are set out as Exhibit F of the Appendix.

While petitioner's appeal was pending, the Florida Supreme Court decided that a six to six vote was a life recommendation. Following its holding in Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983), it vacated Robert Patten's death sentence. However, it rejected petitioner's arguments that he was entitled to the benefit of the jury's attempted life recommendation, that the trial court lacked the

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4. Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983).

authority to reject a recommendation permitted by the jury instructions, and that to subject petitioner to a second capital sentencing proceeding before a new jury would violate the Double Jeopardy Clause. Instead, the Supreme Court of Florida ordered a second capital sentencing proceeding before a second jury.

REASONS FOR GRANTING THE WRIT

I

WHETHER THE FLORIDA SUPREME COURT'S RETROACTIVE REVERSAL OF ITS LONG ESTABLISHED RULE THAT THE STATE BEARS THE BURDEN OF ESTABLISHING THE COMPETENCY OF A PERSON PREVIOUSLY ADJUDICATED INCOMPETENT, AND WHOSE COMPETENCY HAS NEVER BEEN RESTORED, SO DISADVANTAGES A DEFENDANT AS TO VIOLATE THE DUE PROCESS CLAUSE IF HIS CONVICTION IS UPHELD ABSENT ANY PROOF BY THE STATE OF COMPETENCY?

Florida case law, for nearly a century, has held that the usual presumption of sanity does not exist once a person has been found insane. Instead, there is a presumption of continuing insanity, a presumption which can only be removed by proof of sanity. Wells v. State, 98 So.2d 795 (Fla. 1957). See, Bratten, Florida Criminal Procedure §7.4, pp. 89-90 (1983). The consequences of a continuing presumption of insanity were clear: The State, not the defendant, bore the initial burden of going forward, as well as the ultimate burden of proof. Accordingly, until the opinion at bar, Florida decisions uniformly reversed the convictions of individuals with prior insanity acquittals if the State failed to prove at trial that the individual was competent at the time he committed a subsequent offense.

For the first time, on direct appeal of petitioner's convictions, the Florida Supreme Court held that insanity is always an affirmative defense.[5] After-the-fact, the State was

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5. The only authority offered by the Florida Supreme Court for that position was a citation to A.B.A. Criminal Justice Mental Health Standard 7-6.9, A.B.A. Standards for Criminal Justice (2d ed. 1984). Similarly, the State offered no citation of authority in its brief for the proposition that insanity was an affirmative (fn. cont. next page)

relieved of both the obligation of producing evidence and the obligation of proving competency as a essential element of its case in chief. As a result of the abrupt change in law, petitioner's convictions were affirmed.[6] This retroactive judicial lawmaking violates the ex post facto component of the Due Process Clause.

The rule placing both the burden of going forward and the burden of proof on the State dated from at least 1892. Armstrong v. State, 30 Fla. 170, 11 So. 618 (1892). It had been consistently followed. Corbin v. State, 129 Fla. 421, 176 So. 435 (1937); Acree v. State, 15 So.2d 262 (Fla. 1943); Emerson v. State, 294 So.2d 721 (Fla. 4th DCA 1974); Alexander v. State, 360 So.2d 1188 (Fla. 5th DCA 1980); Livingston v. State, 383 So.2d 947 (Fla. 2d DCA 1980); King v. State, 387 So.2d 463 (Fla. 1st DCA 1980); Eason v. State, 421 So.2d 35 (Fla. 3d DCA 1982).

The State, ignoring this unbroken line of authority, made no effort to prove at trial that Robert Patten was competent at the time of the alleged offenses. On appeal, the Supreme Court of Florida, by holding that insanity is always an affirmative defense, eliminated what previously had been considered an essential element of the State's burden of proof. In so doing, the Supreme Court of Florida reversed, without benefit of citation, six of its prior decisions. Perkins v. Mayo, 92 So.2d 641 (Fla. 1957); Wells v. State, 98 So.2d 795 (Fla. 1957); Horace v. Culver, 111 So.2d 670 (Fla. 1959); Dixon v. Cochran, 142 So.2d 5 (Fla. 1962), cert. denied, 371 U.S. 866 (1962); Clark v. Wainwright, 148 So.2d 273 (Fla. 1963); Yates v. Wainwright, 151 So.2d 832 (Fla. 1963).

In Horace v. Culver, supra, the Florida Supreme Court held:

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defense in the situation where a defendant was entitled to a presumption of continuing insanity. The portion of the State's brief on direct appeal dealing with the competency issue is included as Exhibit G of the Appendix.

6. Petitioner does not challenge the power of the Florida Supreme Court to adopt a rule providing that insanity is always an affirmative defense, so long as the rule is prospective.

> The decided cases adequately dispose of the contention that any burden might rest upon the disabled party in such circumstances to inform the court or formally plead his status. An accused cannot, under our law be tried, sentenced or executed while insane, and the ignorance or good faith of the court and prosecuting officers does not serve to validate a proceeding conducted in violation of this precept.

111 So.2d at 671 (footnotes omitted).

The same rule applied if the defendant was convicted after trial. Wells v. State, 98 So.2d 795 (Fla. 1957). Wells was a death case where the State argued that its failure to rebut the presumption of continuing insanity was not properly preserved. The Florida Supreme Court, recognizing the "absolute finality in an executed sentence of death," 98 So.2d at 801, held that even if the defendant had failed to properly preserve the issue, "in appeals where the death penalty has been imposed, we feel it our duty to overlook technical niceties in the interests of justice." Id. The defendant's conviction was reversed. Apparently the philosophy has changed. Now, it is the State's failures that are overlooked.

Nothing in Florida statutory law, Florida case law, or the Florida Rules of Criminal Procedure, prior to Robert Patten's appeal, ever declared incompetency to be affirmative defense where the defendant had previously been adjudicated incompetent and his competency not judicially restored. Because of that, the Florida Supreme Court was unable to cite even one case for the proposition of law it retroactively applied to petitioner.

Certiorari should be granted to resolve the issue of when a change, seemingly procedural in nature, so disadvantages a defendant that it cannot, as a matter of due process, be applied retroactively to sustain a conviction not otherwise sustainable. The issue is clearly presented in the matter sub judice. Prior Florida case law reversed convictions if the State failed to establish competency. By relieving the State of its burden, after the trial, Robert Patten's convictions were affirmed. Petitioner suggests that any procedural rule having the effect of

eliminating an element of the State's proof, or shifting the burden of producing evidence, cannot be applied retroactively.

"The Ex Post Facto Clause is a limitation upon the power of the Legislature, . . . and does not of its own force apply to the Judicial Branch of government. . . . But the principle on which the Clause is based -- the notion that persons have a right to fair warning of conduct which will give rise to criminal penalties -- is fundamental to our concept of constitutional liberty. . . . As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." Marks v. United States, 430 U.S. 188, 192-193 (1977)(citations omitted). "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Bouie v. City of Columbia, 378 U.S. 347, 353-354 (1964).

Lafave & Scott, Handbook on Criminal Law at 94-95 (1972), note that "[p]erhaps the easiest case is that in which a judicial decision subsequent to the defendant's conduct operates to his detriment by overruling a prior decision which, if applied to the defendant's case, would result in his acquittal." The Florida Supreme Court's opinion does exactly what Professors Lafave and Scott suggest amount to the easiest case. It overrules prior precedent under which petitioner's convictions would have been reversed.

Changes in the rules of evidence that work to the detriment of the defendant are barred by the Ex Post Facto Clause. The Clause extends to any alteration, even one labeled procedural, which, "in relation to the offense, or its consequences, alters the situation of a party to his disadvantage . . ." Kring v. Missouri, 107 U.S. 221, 236 (1882). In Hopt v. Utah, 110 U.S. 574 (1884) this Court stated:

> Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed,

> might, in respect of that offfense, be obnoxious to the constitutional inhibition upon ex post facto laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but -- leaving untouched the nature of the crime and the amount or degree of proof essential to conviction -- only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure.

110 U.S. at 591. The principle to be deduced from Hopt and other cases is that a change can only be considered procedural when it does not alter "[t]he quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence, remain the same." Beazell v. State of Ohio, 269 U.S. 167, 170 (1925).

Numerous cases have recognized that a significant alteration in the rules of evidence cannot be applied retroactively to sustain a conviction. United States v. Williams, 475 F.2d 355 (D.C. Cir. 1973), considered statutory amendments altering the quantum of proof necessary to establish insanity and shifting the burden of proof to the defendant. In reaching a conclusion directly opposite to that of the Florida Supreme Court, the Williams Court held that the statutory modifications violated the Ex Post Facto Clause if applied to defendants whose crimes were committed prior to the statutory amendments. The Court stated:

> A long time ago the United States Supreme Court defined ex post facto laws to include "[e]very law which alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798). (Emphasis in original.) That definition represents the law today just as it did in 1798. The retroactive application given Section 207(6) by the trial court "alter[ed] the legal rules of evidence" so that appellant was convicted on "less, or different, testimony, than the law required at the time of the commission of the offence." Certainly the court's charge, "'in its relation to the offence, or its consequences, alter[ed] the situation of the accused to his disadvantage.'" Thompson v. Utah, 170 U.S. 343, 351, 18 S.Ct. 620, 623,

> 42 L.Ed. 1061 (1898), quoting United States v. Hall, 2 Wash.C.C. 366. Moreover, Congress, in enacting Section 207(6), specifically intended to alter the situation of the accused to his disadvantage. Congress was concerned that existing law "* * * permitt[ed] dangerous criminals, particularly psychopaths, to win acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity * * *."
>
> Under the circumstances, appellant's conviction must be reversed on ex post facto grounds.

475 F.2d at 356-57 (footnotes omitted)(emphasis in original).

The adoption of the Comprehensive Crime Control Act of 1984, Pub. L. 98-437, 98 Stat. 1837 (1984), has afforded the District Courts the opportunity to apply the Williams holding in a similar factual context. The Act alters the definition of insanity and shifts the burden of proof to the defendant. Those courts which have considered the issue have, on ex post facto grounds, refused to apply the changes to those defendants who crimes were alleged to have occurred prior to the effective date of the Act. United States v. Prickett, 604 F. Supp. 407 (S.D. Ohio 1985); United States v. Turner, 602 F. Supp. 1295 (S.D. N.Y. 1985); United States v. Kowal, 596 F. Supp. 375 (D. Conn. 1984).

The Florida Supreme Court also shifted the burden of proof. However, it applied the shift, contrary to the weight of authority, retroactively.

Contrary to the Florida Supreme Court, other courts have also recognized that significant alterations in the rules of evidence cannot be applied retroactively. In Walker v. State, 433 So.2d 469 (Ala. 1983), the Alabama Supreme Court held that repeal of the law making inadmissible statements made by a child while in police custody worked such a substantial disadvantage to the juvenile as to invoke the Ex Post Facto Clause. The Court went on to hold that "[b]ut for the legislature's repeal [of the evidentiary bar], the defendant admittedly would have been acquitted. Certainly such a change deprives the defendant of a right in a most substantial way." 433 So.2d at 473.

Similarly, in State v. R. H., 273 S.E.2d 578 (W.Va. 1980), the prior law provided that no testimony of a juvenile offender given at a transfer hearing could be admitted into evidence at any subsequent criminal trial. The trial judge announced that he would apply the new juvenile code, which did not contain the admissibility bar. Therefore, the juvenile chose not to testify in order to protect his fifth amendment rights, resulting in his transfer for trial as an adult. The conviction was reversed, the West Virginia Supreme Court finding that application of the new rule violated the Ex Post Facto Clause.

In State v. Byers, 102 Idaho 159, 627 P.2d 788 (1981), the Idaho Supreme Court abolished the requirement of corroboration for sex offender crimes. However, because no corroborative testimony was offered at Byers' trial, his conviction was reversed. "Obviously," noted the Court, "our holding today alters the legal rules of evidence such that 'less or different testimony than the law required at the time of the commission of the offense [is necessary] in order to convict the offender.'" 627 P.2d at 795.

The Kentucky Supreme Court originally reached the same conclusion in Commonwealth v. Brown, 619 S.W.2d 699 (Ky. 1981). It reversed itself in Murphy v. Commonwealth, 655 S.W.2d 69 (Ky. 1983), cert. denied, ___ U.S. ___ (1984), prompting Justices White, Brennan and Powell to dissent from the denial of the writ. Writing for the dissenters, Justice White suggested that the issue of when a seemingly procedural change offends the Ex Post Facto Clause is ripe for review.

Because the position reached by the Florida Supreme Court, like the position reached by the Kentucky Supreme Court, is inconsistent with a substantial body of federal and state decisional law, petitioner suggests that this Court address the issue of whether eliminating an essential element of the State's case or shifting the burden of proof can ever be applied retroactively.

II

WHETHER THE DOUBLE JEOPARDY CLAUSE IS VIOLATED WHEN THE FLORIDA SUPREME COURT ORDERS A DEFENDANT TO UNDERGO A SECOND CAPITAL SENTENCING PROCEEDING AFTER DETERMINING THAT THE TRIAL COURT ERRONEOUSLY REFUSED TO ACCEPT A JURY LIFE RECOMMENDATION?

Despite its holding that a six to six jury vote at the penalty phrase of a death case constitutes a recommendation for life, the Florida Supreme Court denied petitioner the benefit of the jury's six to six life recommendation and ordered the empaneling of a new jury for purposes of obtaining a second recommendation.[7] As a result, petitioner has lost the benefit of the life vote and is again forced to run the gauntlet of a new trial limited to the issue of penalty.

The basic premise of petitioner, that the State is not entitled to two chances to pursuade a jury that death is the proper sentence, is fully supported by Bullington v. Missouri, 451 U.S. 430 (1981). In Bullington this Court noted the trial like nature of the sentencing procedure and stated:

> By enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has "proved its case."

451 U.S. at 445 (emphasis in original). Justice Blackmun then quoted with approval the observation of the dissenting Judge of the Missouri Supreme Court "that the sentence of life imprisonment which petitioner received at his first trial meant that 'the jury has already acquitted the defendant of whatever was necessary to impose the death sentence.'" 451 U.S. at 446.

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7. In Florida, the jury's recommendation, while not binding on the sentencer (the trial judge), is of critical importance. When the jury recommends death, and the sentencer finds one or more aggrevating factors, death is presumed to be the correct sentence. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). On the other hand, when the trial judge overrides a jury's life recommendation, the override will only be sustained if reasonable men cannot differ that death is the appropriate sentence. Tedder v. State, 322 So.2d 908 (Fla. 1975).

Florida, too, provides a trial like proceeding for determining life or death. In Florida, like Missouri, the burden is on the State to establish that death is the appropriate sentence. The Florida jury is instructed that it can only recommend death if it finds, beyond a reasonable doubt, the existence of one or more aggravating factors and does not find those factors to be outweighed by mitigating factors. Proffitt v. Florida, 428 U.S. 242 (1976). The jury's recommendation, although not binding, is entitled to great weight. A trial judge's authority to override a life recommendation is limited. Tedder v. State, 322 So.2d 908 (Fla. 1975). In all respects, except for the trial judge's ultimate sentencing power, the trial-like Florida procedure is identical to the trial-like Missouri procedure.

The fact finding process, upon which Bullington focuses, was completed when the jury announced its six to six vote. The jury had already acquitted the defendant of whatever was necessary to recommend a death sentence. The values which underlie the Double Jeopardy Clause are "equally applicable when a jury has rejected the State's claim that the defendant deserves to die." 451 U.S. at 446.

Petitioner's original jury was prepared to return a life recommendation. The only reason it did not was the uncalled for jury deadlock instruction given by the trial judge. Once the jury has rejected the State's claim that the defendant deserves to die, Bullington and Arizona v. Rumsey, ___ U.S. ___ (1984), construe the Double Jeopardy Clause to mean that the State is not entitled to another opportunity to convince either the same jury or another jury to make a contrary recommendation. The decision of the Florida Supreme Court is in direct conflict with the double jeopardy principles announced in those cases.

The Florida Supreme Court's decision is also in direct conflict with the decision of the Delaware Supreme Court in Rush v. Delaware, ___ A.2d ___ (Del. March 19, 1985). In Rush, the

Court held that a defendant must be sentenced to life where the trial judge erroneously prevents the jury from returning a life recommendation and, after a jury deadlock instruction, the jury returns with a death recommendation. In reaching its conclusion, the Delaware Supreme Court cited and rejected the Rose decision. Because the two courts have reached diametrically opposite conclusions in identical factual situations, this Court should examine the double jeopardy implications that attach.

The writ should be granted to resolve the question whether a defendant can be exposed to a second capital sentencing proceeding where the first advisory jury's recommendation is rejected because of the error of the trial court.

Robert Patten's entitlement to a life recommendation flows from the fact that a trial judge has no authority to reject a jury's favorable treatment of the defendant. When the trial judge exceeded his authority and improperly rejected the jury's decision making process, the defendant became entitled to the benefit of the jury's attempted verdict. That has been true since at least 1670. Bushell's Case (1670) Vaughan's Rep. 135. It represents one of the great triumphs of the common law, the victory of the jury over the king. As a result, the judge is not authorized to prevent the return of a verdict in a criminal case. See, I Holdsworth, A History of English Law 337-347 (7th ed., reprinted 1971); Thayer, The Jury and its Development, Part III, 5 Harv. L. Rev. 357, 382-385 (1892).

It is accepted as basic constitutional and common law that the court must accept the decision of the jury. State v. Arrington, 7 N.C. 355, 3 Mur. 571 (1819); State v. Ostrander, 30 Mo. 13 (1860). These early decisions established that the trial court must record the verdict first brought in so long as it is not an informal or insensible verdict, or one that is not responsive to the issues submitted.

Robert Patten's jury was ready to return a responsive verdict. The Court prevented it. Robert Patten is entitled to

the benefit of that attempted verdict. There is no authority that permits a "court to refuse to accept a verdict complete in substance and responsive to the issues." State v. Chambliss, 142 Miss. 256, ___, 107 So. 200, 202 (1926). The State may argue that there was no verdict. That is true in the sense that none of the formalities attendant to the return and entry of a verdict took place. But the fault lies with the trial judge, not the jury, and certainly not the defendant. In none of the cases which stand for the hornbook proposition that a court cannot reject a verdict were the formalities complied with. They could not be because the trial court refused to accept the verdict. That type of error cannot be permitted. The petitioner is entitled to the jury's life recommendation.

A typical example of refusal to permit the trial judge to reject the jury's decision is State v. Craig, 176 N.C. 740, 97 S.E. 400 (1918). There the jury returned with a verdict of "not guilty". The judge sent the jury back to consider whether the verdict was "not guilty because of mental incapacity." The North Carolina Supreme Court held the trial court has no authority to send the jury back; the first verdict was binding.

A case analogous to petitioner's is Darsey v. State, 138 Ga. 501, 71 S.E. 661 (1911), app. dis'd, 231 U.S. 741 (1913), where the jury returned with a guilty verdict for a non-charged lesser offense. The judge refused to accept the verdict and sent the jury back. The jury deadlocked and the judge declared a mistrial. The Georgia Supreme Court held that double jeopardy prevented a retrial because the original verdict constituted an acquittal of the greater offenses and the trial court lacked the authority to refuse to accept it. See also, State ex rel. Earsom v. Fisher, 103 W.Va. 658, 138 S.E. 316 (1927). Indeed, the defendant is entitled to the benefit of the jury's decision even if the jury returns a verdict that is contrary to the Court's charge. Register v. State, 10 Ga.App. 802, 74 S.E. 428 (1912).

The error committed by the trial judge is no different, for

analytical purposes, from the error committed by a trial judge who grants a mistrial on his own or the State's motion in the absence of manifest necessity. In both situations, the formalities attendant to the return of a verdict are cut off by the trial judge's error. In the mistrial situation, application of double jeopardy principles, bars a second trial because of the judge's error. Oregon v. Kennedy, 456 U.S. 667 (1982). Thus, the defendant benefits from a totally unknown jury verdict. In Robert Patten's situation, the intent of the jury was obvious. The trial judge's error should not serve to deprive him of the benefit of the jury's life recommendation.

The petitioner will not go free because the trial court erred. The petitioner should, however, receive the benefit of the jury's untainted deliberations. There is no sound reason to deprive a capital defendant of the benefit of the jury's favorable recommendation. That does not seem unfair in light of the nature of the case and the nature of the error.

The writ should be granted to consider whether the Double Jeopardy Clause prevents a court from setting aside a jury recommendation for life, thereby permitting the State another oppportunity to obtain a death recommendation.

CONCLUSION

For the foregoing reasons, the writ requested should be granted.

Respectfully submitted,

* PETER M. SIEGEL, Esq.

RANDALL C. BERG, Jr., Esq.

FLORIDA JUSTICE INSTITUTE, INC.
1400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-2081

Counsel for Petitioner

* Counsel to be served,
Member of the Bar of the Court.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

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ROBERT PATTEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that I served the annexed Petition for Certiorari on respondent by placing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

Calianne Lantz, Esquire
Assistant Attorney General
Office of the Attorney General
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128.

All parties required to be served have been served. Done this 6th day of June, 1985.



Peter M. Siegel, Esq.